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HAROLD B. WILLEY, C

IN THE

Supreme Court of the United States

October Term, 1955.
No. 391

THE PEOPLE OF THE STATE OF CALIFORNIA, on the Relation of ARDY V. BARTON,

Petitioner,

vs.

AMERICAN AUTOMOBILE INSURANCE COMPANY, a foreign corporation, and ASSOCIATED INDEMNITY CORPORATION, a domestic corporation,

Respondents.

Petition for a Writ of Certiorari to the District Court of Appeal, Second District, Division One of the State of California.

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The People of the State of California prays that a writ of certiorari issue to review the judgment of the District Court of Appeal, Second District, Division One of the State of California entered in the above-entitled case on April 13, 1955.

Citation to Opinion Below.

The opinion of the District Court of Appeal is printed in the appendix hereto and is reported in 282 P. 2d 559, and in 132 A. C. A. 377, April 29, 1955.

Jurisdiction.

The judgment of the District Court of Appeal was filed April 13, 1955. Rehearing was denied May 9, 1955. Hearing in the California Supreme Court was denied June 16, 1955. The jurisdiction of this Court is invoked under 28 U. S. C., Section 1257 (3).

How Federal Question Is Presented.

The federal questions of freedom of speech and press, clear and present danger, and prior restraint were first raised in the pleadings in the California Superior Court, the court of first instance. This was done by the respondents who filed a demurrer to the petitioner's complaint. The demurrer was sustained on those grounds, and the petitioner appealed to the District Court of Appeal which sustained the lower court's ruling. See appendix for opinion. Certiorari is directed to the District Court of Appeal and not the Supreme Court because the District Court of Appeal opinion is the highest judgment in the State courts since the California Supreme Court denied a hearing.

Questions Presented.

1. Whether the Constitutional guarantees of free speech and press immunize one against the charge of feloniously attempting to influence a juror in the following circumstances:

Where the accused is an automobile casualty insurance company constantly and widely engaged in personal injury jury trials, and where the accused intentionally and deliberately attempts to influence a juror

with respect to his verdict in such a case by the following plan: the accused places an advertisement in a national magazine having one of the highest circulation figures in the United States with the expectation and purpose that the juror will read it. In the advertisement the accused addresses the juror as a juror and tells the juror that the more he awards the plaintiff the more it is going to cost said juror in higher prices and premiums. A juror, Hazel Engelman, receives the advertisement-message, reads it, and is so moved thereby that she takes it to the juryroom in the personal injury case which she is then trying and pins the advertisement-message on the wall. All the jurors read and discuss it and then render a verdict in the said case. The only purpose of the accused in publishing the advertisement and causing it to be sent through the mails to regular subscribers and purchasers is to influence the juror with respect to his verdict in personal injury cases. There is no conflict of evidence.

2. Whether it is necessary to make a showing of clear and present danger in such a case.

3. Whether such a case makes a showing of clear and present danger.

4. Whether a fine, or penalty or restraining order constitutes a prior restraint against the accused in such a case.

Statutes Involved.

1. Free speech and press provisions of the First and Fourteenth Amendments of the United States Constitution.

2. California Penal Code, Section 95, Attempts to influence jurors.

"Every person who corruptly attempts to influence a juror, or any person summoned or drawn as a juror, or chosen as an arbitrator, or umpire, or appointed a referee, in respect to his verdict in, or decision of any cause, or proceeding, pending, or about to be brought before him, either:

"One. By means of any communication, oral or written, had with him except in the regular course of proceedings;

"Two. By means of any book, paper, or instrument exhibited otherwise than in the regular course of proceedings;

"Three. By means of any threat, intimidation, persuasion, or entreaty; or,

"Four. By means of any promise, or assurance of any pecuniary or other advantage;

"—Is punishable by fine not exceeding five thousand dollars, or by imprisonment in the state prison not exceeding five years."

Statement.

This is an action begun on the relation and information of the relator. The Attorney General of the State of California brought an action in *quo warranto* against the charters of two insurance companies for violating the laws of the State of California. This is a civil suit and not a criminal action. The cause of action however, depends upon whether the insurance companies have violated the laws of the State. The action was filed in the State Superior Court on November 13, 1953. The respondent insurance companies filed a demurrer on the

ground of Constitutional protection of free speech and free press. The demurrer was sustained. The complaint was amended to show, among other things, that the respondents attempted to influence a specific juror in a specific case. This amended complaint was again demurred to on the same grounds of free speech and press as well as no clear and present danger shown and the action constituted a prior restraint. The demurrer was sustained again by the Superior Court. The petitioner refused to amend and took an appeal to the District Court of Appeal of the State of California. There was no trial on the facts. All the facts were deemed true as alleged and the case was determined purely as a matter of law on the pleadings.

The District Court of Appeal sustained the judgment of the court below stating that the respondents were protected by the 1st and 14th amendments of the Constitution, that there was no showing of clear and present danger, and that the action constituted a prior restraint. It filed its opinion on April 13, 1955. The petitioner applied for a rehearing which was denied Petitioner applied for a hearing in the Supreme Court of California and was denied on June 16, 1955.

Reasons for Granting the Writ.

1. Conflict.

There is a direct conflict between the California District Court of Appeal opinion printed in the appendix hereof and reported in 132 A. C. A. 377, 282 P. 2d 559 and *Beauharnais v. Illinois,* 343 U. S. 250.

In the *Beauharnais* case the defendant was convicted of violating the Illinois group libel law by distributing

leaflets proposing the adoption of segregation laws and portraying Negroes as being depraved, criminal and unchaste. The trial court refused to instruct the jury on clear and present danger. The Supreme Court held that the lower court was correct and said that like lewd and obscene speech, this type of speech was not entitled to constitutional protection. The Court reasoned that libel of an individual was a common law crime and thus criminal in the colonies. It stated that today every American jurisdiction has such a law.

The reasoning of the *Beauharnais* case is equally applicable to attempts to influence jurors. This prohibition is firmly imbedded in the earliest beginnings of the law. It protects a far more important aspect of societal existence than does the law against libel. If the respondents were actually intending and attempting to influence jurors, as the demurrer admits, by a plan of mass advertising and saturation mailing, they ought to be subject to the rule of the *Beauharnais* case.

2. Importance.

The legality of sending or communicating extra-judicial advice and information to jurors is of extreme importance to the legal world, to newspapers and advertisers, to insurance companies and bar associations and to all the personal injury claimants in the United States, to every litigant who seeks relief in our courts by the constitutional right of jury trial. The very nature of jury trial is at stake in this question.

In the last two years, bar associations all over the country have rendered exhaustive reports, recommendations and resolutions on the subject. The New York

Bar Association, The American Bar Association and the 1953 Convention of Delegates of the California Bar Association have been most notable among these.

In March 1954, the Superior Court Judges of Sacramento County, California dismissed a jury commissioner because he admitted that he had talked to prospective jurors about so-called excessive verdicts and had shown them the very same communications here in question. Several cases have arisen throughout the nation from this type of campaign and an authoritative decision is needed to settle and clarify the problem.

3. The District Court of Appeal Opinion Is Erroneous.

a. The case should have been determined on the basis of whether the respondents had attempted to influence the juror Hazel Engelman with respect to her verdict in *Smith v. Ledbetter*. The complaint alleged that respondents had so attempted on the basis of *People v. Connors*, 70 Cal. App. 315 (233 Pac. 362) where the court held that since Defendant intended to influence all of that class, he also intended to influence the specific juror named in the complaint who was a member of that class.

Therefore, if a trial court had found that as a matter of fact, the respondent intended to attempt to influence said juror or jurors, the rule in the *Beauharnais* case would have found against the respondents.

b. According to the *Beauharnais* case, if the respondents were actually attempting to influence the juror, clear and present danger need not have been shown.

c. However, clear and present danger existed in the fact that the juror received the communication as planned, that she took it to the juryroom and pinned it up on the

wall where all the jurors saw it and discussed it and then decided the case. It is within the principle of *Doss v. Lindley,* 53 Fed. Supp. 427, in that it was an *actual interference with the administration of justice.*

d. To have fined the respondents would not have constituted a prior restraint.

The gravamen of the action is not the mere publication but the communication with the juror which the respondents intended to do. That is a principal difference between the contempt action in the *Bridges* case and the criminal attempts to influence a juror in *People v. Connors, supra.*

The *Bridges* case should be confined strictly to contempt cases and the *Beauharnais* case should be applied to criminal cases of the sort involved here. The case at bar should have been decided under the rule of the *Beauharnais* case and not *Bridges v. California,* 314 U. S. 252.

Conclusion.

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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